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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 887

BOTANY WORSTED MILLS,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 888

BOTANY WORSTED MILLS,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF FOR BOTANY WORSTED MILLS IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

FREDERIC R. SANBORN,
Of Counsel for Botany Worsted Mills.

THE COURT PRESS, N. Y. C.

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The Board argues in its brief in opposition to Botany's petition for writs of certiorari that Botany's attempt to challenge the results of the election of November 8, 1940, was neither timely nor meritorious.

Shortly after the election, and after November 15, 1940, Botany received two letters signed by 20 of the 32 employees who took part in the election. In these letters, the employees stated that they no longer desired to be represented by the union. In its brief, the Board com-

plains that Botany waited until March 7, 1941, before it officially notified the Board of this fact. This is a period of less than four months. The Board has declared this short period to be a lapse of time sufficient to bar the reopening of the hearings upon the ground of laches. The Board refused to reopen the hearings to consider the two letters upon the ground that Botany had moved too late.

Firstly, it ill-behooves the Board to adopt such an arbitrary attitude when, in case after case involving unfair labor practices, the Board has excused its own failure, or the failure of a union, to take action for periods running from two to four years. We cite a few cases in which motions to dismiss for laches made by respondents in unfair labor practice cases were invariably denied:

4 years: *The Barrett Co.*, 41 N. L. R. B. 1327, 1329;

3 years: *Cowell Portland Cement Co.*, 40 N. L. R. B. 652, 655;

2 years: *Brown Paper Mill Co.*, 36 N. L. R. B. 1220, 1222;

2½ years: *N. Y. & Porto Rico S. S. Co.*, 34 N. L. R. B. 1028, 1044, Footnote 28;

2½ years: *Colorado Milling & Elevator Co.*, 11 N. L. R. B. 66, 68.

By denying Botany's motion to reopen the hearings upon the ground of laches by a lapse of less than four months, the Board shows a tendency to excuse laches on the part of any one other than an employer.

It is also important to note that, assuming but not admitting that Botany was guilty of laches, Botany's alleged delay was not attributable to the employees, and should not prejudice their rights.

* * *

Moreover, in the instant case, the Board has given blind adherence to certain of its own private policies while at

the same time disregarding the public and primary purpose of the Act. In effect, the Board has made its so-called presumption of continuity irrebuttable. The Board has stated that there is a presumption that once the status of a collective bargaining agent is ascertained that that status continues. In its blind adherence to the so-called and irrebuttable presumption, the Board has entirely missed the most important point in the case.

That point is that the rights here brought to the attention of the Board and to the Court are not primarily the rights of Botany, nor the rights of the union. *They are primarily the rights of the employees.*

The legislators who made the National Labor Relations Act a law of the United States clearly and emphatically stated the purpose of the Act to be to protect the "*full freedom*" of employees to select representatives of their own choosing. The paramount importance of this policy is shown by the fact that the legislature has clearly set it out in §1 of the Act:

> "It is hereby declared to be the policy of the United States to * * * protect * * * the exercise by workers of *full freedom* of association, self-organization, and designation of representatives *of their own* choosing * * *".

Botany could not have waived or relinquished the employees' rights by any direct action on its part. How can it be said, then, that the employees' rights have been waived or relinquished indirectly, by Botany's alleged laches?

In the Botany case, the Board gave rigid support to its self-created presumption of continuity while at the same time it arbitrarily refused to accept cogent evidence offered to rebut that presumption.

All of the evidence so offered was offered to show that the employees had withdrawn any agency that might have been created by the election of November 8, 1940. Its sole purpose was to convince the Board that the full freedom of employees had in fact been exercised by them.

In refusing to accept the above mentioned evidence, the Board is guilty not merely of nonfeasance in failing to recognize the statutory right of the employees to change their minds. The Board is guilty of an affirmative misfeasance. The Board in actuality has affirmatively denied the employees their statutory right to freely choose—and freely change—their representatives, and it has held, by clear inference, that the rights of the employees can be destroyed by alleged negligence in asserting them by the employer.

No question of laches on the part of the employees themselves is even asserted by the Board, nor could it be. The employees are not, and never were, parties to this proceeding.

In view of the fact that the employees were not parties to this proceeding, and in an attempt to establish the true desires of the employees, Botany made numerous attempts to introduce evidence at the hearings to prove that the employees had withdrawn any agency that might have been given to the union.

On cross-examination an attempt was made to question one of the union officials in order to adduce testimony proving that shortly after the election of November 8, 1940, at a union meeting, the employees told that official, and other union officials, that they did not wish to have the union represent them for collective bargaining purposes. The trial examiner excluded this entire line of questioning (Bot. A, 68a).

At another point in the hearing, also upon cross examination, Botany attempted to obtain the names of the employees who were also members of the union for the pur-

pose of introducing their own testimony as to their desires. The trial examiner again cut short the questioning (Bot. A, 33a-35a, 42a).

At another time, Botany requested the issuance of subpoenas to all of the various employees, so that their testimony could be taken upon their own desires as to a collective bargaining agent. The Board refused to issue the subpoenas and refused to consider such evidence at any time (Bot. A, 45a to 75a).

As a last resort, in its endeavor to bring the desires of the employees before the Board, Botany attempted to reopen the hearing so that the two letters received by Botany after November 15, 1940, in which the employees expressed their dissatisfaction with the union, and the fact that they no longer desired to be represented by the union, could be received in evidence. Botany's motion for this relief was denied, showing a continuous purpose on the part of the Board to refuse to accept any evidence whatsoever of the actual desires of the employees themselves (Bd. A, 110-118).

Under the circumstances of this case, the Board should have leaned over backwards to make sure that every possible evidentiary fact concerning the desires of the employees was presented for its consideration.

In a case such as this one, which involves the basic policy of the United States, the Board itself should have taken, and not excluded, all relevant evidence, to make sure that it had all the facts.

Had all of the evidence been admitted, and all of the facts considered, there would have been substantial, uncontradicted evidence in the record to show that the so-called presumption of continuity had been completely rebutted.

Under such circumstances, the Board should either have dismissed the charges, or else it should have held a new election. With only 32 voters, a second election would

have been a simple matter. The failure of the Board to adopt this simple solution has not only resulted in several years of litigation, but has denied the employees their statutory guarantee of a full freedom of choice of a bargaining agent since March, 1941.

The Board's decision is squarely opposed to the statutory public policy of the nation, as enunciated in §1 of the Act. To sustain the Board's decision is to nullify the Act.

* * *

To illustrate that the so-called presumption of continuity is rebuttable, Botany, on page 21 of its main brief, cited numerous cases in which the courts have in every instance, so stated. To make this point stronger, Botany chose cases in which the courts stated the above rule to be true, but in which the courts refused to find that the presumption had been rebutted. In every one of these cases the Courts and the Board had found that the employer had been guilty of an unfair labor practice, usually to oust the union theretofore declared to be the collective bargaining agent. *That factor is not present in the Botany case as expressly found by the Circuit Court.*

Botany has no quarrel with these decisions. Conceivably where the shift in majority has been caused by an unfair labor practice on the part of an employer, it would be unjust to permit a shift, so induced, to be received in evidence to rebut the presumption.

On page 13 of its brief, the Board cites two of the said cases cited by Botany, as authority for the proposition that certification procedure would be rendered unworkable if the employer were free to refuse to bargain with a certified union. Botany again wishes to point out that in both of these cases an unfair labor practice was present. The courts accordingly refused to allow the presumption to be rebutted.

In a footnote on page 13 of its brief, the Board attempts

to distinguish only one of the cases cited by Botany: *N. L. R. B.* v. *Whittier Mills,* 111 Fed. (2d) 474. Since the Board does not attempt to distinguish the *Valley Mould & Iron Corp.* v. *N. L. R. B.* case, 116 Fed. (2d) 760, it must be taken as an admission that an unfair labor practice was a factor in that case influencing the court to refuse to allow the presumption to be rebutted.

As to the *Whittier* case the Board on page 13 of its brief claims that the alleged shift of majority took place prior to the commission of any unfair labor practice. By inference, this is an argument that the presumption was sustained even though the unfair labor practice could not have been a factor in the alleged shift of majority. The Board, therefore, argues, again by inference, that the presumption was sustained in the absence of an unfair labor practice.

A careful reading of the Board's decision in the *Whittier* case (*supra* 111 Fed. (2d) 474) and of the decision of the Circuit Court fails to disclose any basis for the above claim. On the contrary, it definitely appears that there was an unfair labor practice present in the case. The Circuit Court stated at page 478 to 479:

> "The Board has found that in this case there was not an emergency wage reduction, but there was a deliberate effort by a sudden well-timed wage cut to discourage if not defeat any bargaining on that subject. Such was the natural effect of it, and if that was its purpose, as the Board finds, adhered to after remonstrance, we hold that there was a refusal to bargain about wages within the Act.
>
> (14) 3. The Board goes further and finds that the wage cuts, so timed, and with total disregard of the Committee, were such a flouting of the Committee as necessarily discouraged the employees in maintaining their connection with and representation by it, and interfered with and coerced them contrary to Section

8(1). In the light of the intention attributed by the Board to the mills, we uphold this conclusion, though there is no express proof that any employee was in fact affected or his course changed thereby."

Referring to the time that the unfair labor practice took place, we refer to page 463 of the Board's decision (*Whittier Mills Co.*, 15 N. L. R. B. 457):

> "In coming to this conclusion, we are not unmindful of the fact that the status of the T. W. O. C. as the exclusive representative of the respondents' employees in the respective appropriate units was not questioned by the respondents at the times of the alleged refusals to bargain."

The Board also stated at page 462 of its decision:

> "At the hearing herein, for the first time, the respondents claimed that the T. W. O. C. ceased to represent a majority of the employees in the respective appropriate units some time prior to June, 1938."

Concededly from the above, the hearing took place after the refusal to bargain. It, therefore, appears that the alleged shift in majority took place between that time and the date of the hearing. From the above, it also appears that the first time the employer claimed that the union had ceased to represent a majority of its employees was at the hearing. There is nothing in the decision either of the Board or the Court to indicate the exact time.

From the quotation from the Circuit Court decision (*supra* 111 Fed. (2d) 474), it is clear that the Circuit Court based its decision upon the presence of an unfair labor practice. *The court also found that there was insufficient evidence presented by the employer to sustain a finding that a majority of the employees did not desire to be represented by the union.*

On page 478, the court stated:

> "There is no certain evidence that a majority of the present employees do not now desire representation by the Committee."

The *Whittier Mills* case, therefore, is merely authority for the proposition that where the court finds an unfair labor practice, or where insufficient evidence is offered to rebut the presumption, the court will refuse to allow the presumption to be rebutted.

As stated above, in the *Botany* case there was not even a scintilla of evidence indicating Botany to be guilty of an unfair labor practice. The Board made no claim of unfair labor practice in its complaint, although in its decision, there was some mention of coercion. The Circuit Court of Appeals affirmatively struck out from that decision, and from the cease and desist order of the Board, any finding of an unfair labor practice upon the ground that there was absolutely no evidence in the case to sustain such a finding.

In the absence of an unfair labor practice, and by refusing to accept evidence to rebut the presumption of continuity, the Board has again denied to the employees their guaranteed statutory right to freely choose representatives of their own choosing.

Botany's reply brief is submitted in an effort to bring before this Honorable Court, the point that the primary and sole purpose of the Act is to guarantee to employees an absolute free choice of representatives of their own choosing. Only actions that would tend to interfere with this right should influence the Board in administering the Act. The Board's self-created policies of convenience must fall before the primary purpose. In the instant case, in the absence of finding of an unfair labor practice, and in refusing to consider the evidence offered by Botany

to rebut the presumption, the Board denies the employees their primary right. We repeat, to sustain the Board's decision is to nullify the Act.

* * *

CONCLUSION.

The petition for writs of certiorari should be granted.

PUTNEY, TWOMBLY & HALL,
Attorneys for Botany Worsted Mills,
Office & P. O. Address,
165 Broadway,
Borough of Manhattan,
New York City.

FREDERIC R. SANBORN,
THOMAS M. KERRIGAN,
Of Counsel.